



**Small Business  
Commissioner**  
SOUTH AUSTRALIA

Mr Garry Clements  
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Consumer Affairs Australia and New Zealand

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Dear Mr Clements

### **Submissions of the South Australian Small Business Commissioner to the Australian Consumer Law Review Issues Paper**

I write to you in my capacity as the South Australian Small Business Commissioner. The Office of the Small Business Commissioner (OSBC) is an independent statutory office. The legislation underpinning the OSBC is the *Small Business Commissioner Act 2011* and a key aim is to resolve business to business or business to government (including local government) disputes or complaints in a timely manner without the need for litigation.<sup>1</sup>

My understanding is that *Consumer Affairs Australia and New Zealand* are undertaking a review of the *Australian Consumer Law* ("the ACL")<sup>2</sup> throughout 2016 to assess whether the law is working effectively and what could be improved.

From the outset, please let me clarify that neither I as the Small Business Commissioner, nor my Office ('OSBC') might not fit the definition are strictly "a Regulator" pursuant to the ACL<sup>3</sup>, but due to its scope, my office does field a substantial number of enquiries from small businesses – in the main sole traders or family enterprises – many of which deal with issues that arise where the small business is operating "as a consumer".

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<sup>1</sup> It is important to note that the OSBC operates in the alternative dispute resolution (ADR) space where the conversation is non-partisan and based upon the broader interests of disputing parties, as compared to any legal rights they might have (which would be determined by a Court or Tribunal). This almost always requires the parties to negotiate in good faith, and on occasion we will seek to resolve the matter through mediation. Further details about this office are available at [www.sasbc.sa.gov.au](http://www.sasbc.sa.gov.au)

<sup>2</sup> The ACL is Schedule 2 of the *Competition and Consumer Act 2010* (Cth). South Australia has enacted legislation to apply the ACL as a local law through the *Fair Trading Act 1987* (SA).

<sup>3</sup> I do note however that Sub-section 4B(3) of the *Fair Trading Act 1987* (SA), states: "However, the Small Business Commissioner may only be assigned responsibility for administration of the Australian Consumer Law (SA) or Part 3A in relation to an industry code or provisions of an industry code insofar as the Law, code or provisions apply to persons who acquire or propose to acquire goods or services for the purpose of trade or commerce or regulate the conduct of traders towards other traders." (My emphasis)



Significantly fewer enquiries however, relate to the obligations of the business in its dealings with consumers.

The major issues that have come to the attention of the OSBC are addressed below, in the order in which they appear in the Issues Paper.

### 2.1.1 Structure and Clarity

#### Clarity of the definition of "Consumer"

The Issues Paper itself exposes the ambiguity surrounding the notion of a 'consumer' under the ACL.

So whilst the ACL extends its protections to a broad range of purchasers in the marketplace, the Paper notes that there is no single, overarching definition of 'consumer' that applies across the entire legislation. The Paper goes on to note that the 'person' protected under the legislation varies depending on the particular provision in question.

So whilst a number of ACL provisions apply to a 'consumer'<sup>4</sup>, some apply to a different class of persons or things - typically where broader protections in the marketplace are needed – see for example:

- all 'persons' are covered for unconscionable conduct;
- but only 'consumer contracts' are covered for unfair contract terms; and
- only 'consumer goods' are covered for product safety.

For the purposes of consumer guarantees and the unsolicited consumer agreements provisions, the person protected is a 'consumer' who has acquired particular goods or services that are:

1. "ordinarily acquired for personal, domestic or household use or consumption"; or
2. where the amount paid "did not exceed \$40,000"<sup>5</sup> (see below and at s.3(1) of the Act).

This definition of a 'consumer' is in part based on a type of behaviour, rather than through defining an entity in itself. Importantly for this Office, this definition does mean that in some limited circumstances, businesses do receive consumer protections.

The addition of a monetary threshold means that businesses have certain rights if the transaction falls within the monetary threshold.

Like the ACCC, our experience is that in practice, many small and medium-sized businesses, as well as consumers, can use and do rely on protections provided by the ACL.

Notwithstanding this, our anecdotal experience is that there does appear to be some confusion regarding the application of the ACL to small businesses.

This is reflected in the complete absence of any reference to 'small business' in the document which formed the foundation of the ACL, *the Intergovernmental Agreement for the Australian Consumer Law*. This document however, seems to concentrate on the consumer

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<sup>4</sup> For example, see consumer guarantees and unsolicited consumer agreements (Part 3-2).

<sup>5</sup> Note – the \$40,000 threshold was introduced in 1986 and has not been varied since.



vs business dichotomy, at the expense of considering a 'small business' to be (or be able to be) "a consumer".

I note that during the development of the ACL (Second Reading speech on 16 March 2010), Senator Joyce said (emphasis added):

*"The original proposal for this bill extended the application of the unfair terms law to business-to-business contracts. This had been agreed to by cabinet and was in accord with the recommendations of the Productivity Commission, but then Minister Emerson gained responsibility for the portfolio and within days he exempted business-to-business contracts. The minister's reason for this was that, in his view, including business-to-business contracts would create uncertainty in business dealings, would potentially increase costs and would possibly jeopardise small business funding. All of these arguments could equally apply to business-to-consumer contracts, so there is a paradox in his change of position. The minister's reasons are unconvincing and he has referred the matter to reviews of the Trade Practices Act and the Franchising Code of Conduct. The minister has now delivered an initial response to the Franchising Code of Conduct review and there is no mention of unfair terms provisions.*

*A broad section of the small business community was dismayed by the government's change in direction. For example, the Australian Newsagents Federation has some 2,100 members, nearly all of whom employ fewer than 20 staff and most of whom employ five or fewer. They are subject to standard form contracts in their dealings with major companies such as News Limited, Fairfax and Hallmark Cards. In these contracts, the majority of key contractual terms are presented on a take-it-or-leave-it basis. For major items of their stock they can go to no other suppliers. In addition, they may be subject to a standard form contract covering the lease of their premises in a shopping centre. This example demonstrates that, in their dealings with larger businesses, small businesses face the same issues as individual consumers. Like individual consumers, they lack the resources to engage the legal and other expertise required to negotiate contracts. Even if they did, they lack the bargaining power to enforce their views. It is self-evident that there is an immense power discrepancy between small businesses and large businesses, which is similar to the discrepancy between consumers and businesses.*

***In summary, there is a compelling case for regarding small businesses in the same light as consumers when they are buying goods or services to consume themselves or to offer for resale. Small businesses have a dual role in consumer policy: not only do they supply goods and services, they are also consumers in their own right. Small businesses will be the losers in the government's reversal. The coalition will therefore be taking an active interest in the outcomes of the reviews of the Trade Practices Act and the Franchising Code of Conduct and will wait for the government's response to those reviews."***

The above statement referred particularly to the *Unfair Contract Terms* sections of the ACL (which have now been amended to apply to business-to-business contracts effective from 12 November 2016). However, 'small business' seems to be often precluded from the general

protections of the ACL – for example regarding the guarantee of acceptable quality (Section 54), largely because of the (variable) definition of a ‘consumer’ within the ACL.

There is no need to recite Section 3 of the Act, however it seems clear that a business will be ‘a consumer’ where it has purchased an item (or service) that costs less than \$40,000 (or if costing more than \$40,000 the item or service was the sort of thing that is usually used for domestic purposes), AND the item purchased is not ‘used up’ in a manufacturing process or re-supplied. (My emphasis)

The other purchase that attracts the protection of the ACL is a “commercial road vehicle”. The inclusion of a commercial road vehicle is further evidence that a business can be a consumer – commercial road vehicles being almost solely purchased by businesses rather than non-business consumers. Further, the onus falls upon the seller to disprove that a person claiming to be ‘a consumer’ does not satisfy the definition.

**Example** - A recent caller to OSBC, referred by the ACCC, was a sole trader selling musical instruments. He had purchased a clarinet from a foreign manufacturer and on-sold it to a customer. The clarinet developed a fault about two years after the purchase by the customer, and the sole trader was faced with a cost of about \$600 to rectify, but without any remedy under the ACL against the manufacturer.

The example above also causes some confusion as to the circumstances in which a small business will qualify as a ‘consumer’. This can be readily seen in referrals from *Consumer and Business Services* (CBS)<sup>6</sup> to the OSBC arising from ACL issues where the ‘consumer’ is a small business.

**Examples** - A pizza shop owner and a hamburger shop owner who had contacted CBS about ovens they purchased (costing approx. \$20,000) but not in circumstances attracting the disqualification of subsection 3(2). They were both referred to OSBC, presumably due to an assumption by CBS that the businesses were not ‘consumers’ and therefore not protected by the ‘fitness for purpose’ and repair or replace requirements afforded to a consumer.

Nonetheless, there seems to be a ‘disconnect’ between this aspect of the legislation and the way it is interpreted by the relevant regulator.

In my submission, it should be patently clear in the ACL that a business can be (and in many cases is) a consumer. Specifically regarding re-sellers (or ‘re-suppliers’), I am not aware of the policy reason that these are excluded from being consumers, but am interested to

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<sup>6</sup> See: [www.cbs.sa.gov.au](http://www.cbs.sa.gov.au) The South Australian Office of *Consumer and Business Services* (CBS) is comprised of the former Office of Consumer and Business Affairs (OCBA) and the Office of the Liquor and Gambling Commissioner (OLGC). CBS is a division of the South Australian Government’s Attorney-General’s Department. CBS ensures that laws affecting consumers, traders and businesses in South Australia are fairly and effectively administered. CBS provides a diverse range of services to support the every-day activities of South Australian citizens whether consumers, traders or businesses.



understand what that reason is and whether it is something that should be revisited as part of this review.

**Recommendation:** It seems to me that an amendment to the definition of 'consumer' is warranted to make it clear and explicit that a small business can in fact be a consumer.

### 2.1.2 The threshold sum of \$40,000

Regarding whether the (current) \$40,000 threshold remains appropriate and relevant in today's market, my submission would be that the threshold should be increased from the current \$40,000, to \$100,000. In support of this submission, I note that \$40,000 in 1986 would roughly equate to around \$86,000 in today's terms. If the threshold was raised to \$100,000 this would allow for it to be maintained at this sum for some medium term.

I would also submit that a threshold of \$100,000 would allow these provisions to apply to a suite of disputes that are typically notified to my Office concerning small business vans and other small to medium-sized commercial vehicles.

I agree with the point made in the Paper that *information about consumers* now has (an increasing) value within the commercial market. Some commercial ventures trade entirely in collating, packaging, buying and selling this type of information, often making significant profits in the process and this appears to be an emerging industry sector. On that basis, I would submit that the notion of 'consumer' should be expanded to cover situations where 'a consumer'<sup>7</sup>, provides their information or data to another business<sup>8</sup>, as compared to the simple acquisition of goods and/ or services.

#### The ACL should apply to charities and not-for-profit organisations

Finally on this point, it is my submission that the ACL should apply to charities and not-for-profit organisations, in the same manner that it does to other commercial entities. This would eliminate a technical distinction and broaden the application of the ACL to the benefit of consumers more broadly.

#### Clarity of the definition of "small business"

The Interpretation provisions at Section 4 of the *Competition and Consumer Act 2010* (Cth) ('CCA') defines 'business' to include a not-for-profit business but does not contain a separate definition of 'business' or a 'small business'. This will be remedied to some extent with ACL amendments commencing in November 2016 introducing a definition of "*small business contract*" through which it can readily be inferred that a small business is one that employs less than 20 people.

However, in relation to the section concerning superfast telecommunications networks (Section 152AGA) the CCA adopts the definition of small business used in the *Fair Work Act 2009* (Cth) – i.e. a business employing fewer than 15 employees (see section 23).

<sup>7</sup> Which as already submitted, should explicitly include a business.

<sup>8</sup> Including by not limited to, a comparator website.

It is unclear to me why there ought to be a difference in the threshold number of employees to qualify as a 'small business' within the same suite of consumer protection.

### 2.3 The Australian Consumer Law's specific protections

At 2.3 of the Paper, and specifically at 2.3.4, the question is raised as to "Does the ACL need a 'lemon' laws provision and, if so, what should it cover?"

My submission is that I support the implementation of so called 'lemon' laws to a limited extent. That extent should be that such laws shift home any liability to a manufacturer, or where goods are manufactured overseas, to the Australian importer of the goods, rather than imposing liability on say, a retailer or dealer etc. (who will often be a small business).

It might be advisable however to reserve a discretion in this regard, perhaps to operate more as a deterrent, to accommodate an instance where a retailer/ dealer or the like has deliberately impaired or hindered such a claim to the material detriment of the affected consumer(s).

With reference to Box 6 (at page 25 of the Paper), I note that under many of the United States' 'lemon' laws, there is a requirement "that parties undergo informal dispute resolution before going to court."

Given the successful experiences of the alternative dispute resolution (ADR) work performed by my Office (and mediation that can be ordered by the Magistrates Court in South Australia), this is a concept that I would submit is highly worthy of merit.

A key aim of my Office is to utilise ADR to resolve disputes or complaints in a timely manner without the need for litigation. It is a primary function of my Office to operate in the ADR space where the conversation is non-partisan and based upon the broader interests of disputing parties, as compared to any legal rights they might have (as might be determined by a Court or Tribunal).

#### 2.3.3 ACL Specific protections – Consumer Guarantees

For the purposes of **consumer guarantee provisions**, the person protected is a 'consumer' who has acquired particular goods or services that are:

1. "ordinarily acquired for personal, domestic or household use or consumption";  
or
2. where the amount paid "did not exceed \$40,000."

It is my experience and my submission that small businesses are no less vulnerable than an individual consumer when it comes to purchasing goods and services which later do not meet the requirements of the ACL.



As mentioned above, the South Australian experience has been that CBS<sup>9</sup> ordinarily refers such business complainants to OSBC. In these circumstances, *it may be* appropriate to consider including OSBC as a “regulator” for the purposes of the ACL.

As referred to at page 21 of the Issues Paper, the question of just what constitutes a ‘major failure’ and how to differentiate these from failures that are ‘repairable’ is one of the major concerns of complainants (be they a small business or an individual).

**Example** – An OSBC case concerned repairs to a diesel delivery van. The van was less than two years old and within new car warranty. The engine had begun making unusual noises upon starting (which later faded as the engine warmed). The dealer, supported by the manufacturer, attempted repairs and after a week provided a replacement loan vehicle to the tradesman. It took 13 weeks however to repair the fault. The query was then, whether:

- this a major failure?
- if not, would say 20 weeks have equated to a major failure?
- If the patience of the owner was finally exhausted, how would he force the dealer/ manufacturer to replace or refund?

My Office’s experience is that when these types of complainant approach a regulator, they are most often seeking some type of enforcement. Therefore, it might be appropriate for the Government to consider the introduction of some sort of summary process by the regulator – one that will result in quicker resolutions of complaints against suppliers – and one that is more than merely advising the complainant to seek any redress that they might have in the Courts.

Whilst this sort of issue is troublesome for an individual consumer, the time that a small business owner needs to take away from their small business to bring such litigation, and then enforce a remedy, can only result in further losses for that business. If my earlier submission is correct - that small businesses are no less vulnerable than individual consumers when it comes to purchasing goods and services which later fail to meet the standards required under the ACL – then this has to equate to a perverse outcome.

### 2.3.5 Unsolicited Consumer Agreements

For the purposes of the **unsolicited consumer agreements** provisions, the person protected is a ‘consumer’ who has acquired particular goods or services that are:

1. “ordinarily acquired for personal, domestic or household use or consumption”; or
2. where the amount paid “did not exceed \$40,000.”

While the protection of the *Unfair Contract Terms* provisions (ss. 23 ff.) will be extended to small businesses from 12 November 2016, there appears to me to be a gap in relation to

<sup>9</sup> Consumer and Business Services – see: [www.cbs.sa.gov.au](http://www.cbs.sa.gov.au)

another type of regulated contract - *Unsolicited Consumer Agreements* (Division 2 – ss. 69 ff.)

Regulation 81 excludes a “business contract” from the protection of the ACL. In that regulation, a business contract is defined as “*an agreement for the supply of goods or services not of a kind ordinarily acquired for personal, domestic or household use or consumption*”.

Given this definition, a business (e.g. a sole trader) that is offered, for example, an unsolicited contract to provide advertising is unlikely to receive protection under the ACL.

However, if the same sole trader offered gutter-cleaning they will receive ACL protection. From my perspective, it is difficult to discern the policy reason behind such an exclusion, particularly as the small business person may be equally as vulnerable as a non-business consumer being offered a contract.

On this point, I note that from the perspective of my Office, these types of contract have become a regular source of complaint to OSBC from small businesses. Accordingly, my submission is that time-poor small businesses in particular (as was illustrated in this case) are highly vulnerable to unconscionable conduct. I further note that this issue may, or may not be ameliorated by the extension of *Unfair Contract Terms* from November 2016.

The recent “unconscionable conduct” litigation brought by the ACCC regarding *The Community Network* (TCN)<sup>10</sup> offers an instructive case study with regard to unsolicited sales.

I note though that the sheer amount of work that was required by all of the Small Business Commissioners, as well as the ACCC in bringing about those successful proceedings, clearly indicates that these types of company are present and operating in the Australian market-place.

Accordingly, my strong submission is that there does need to be ability and capacity within the ACL to:

- 1 deter persons from commencing such trading;
- 2 provide the ability to monitor, police and enforce the law regarding this ‘type’ of unconscionable trading; and
- 3 convey a sufficient message to prevent others from trading in a similar manner, or from the same persons “phoenixing” in the future.

### **3.2.2 Types of ACL civil penalties and remedies**

At 3.2.2, I note with interest the discussions about “phoenixing”<sup>11</sup> at Box 13 of the Paper.

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<sup>10</sup> *Multimedia International Services Pty Ltd*, trading as *The Community Network* – see: <http://www.accc.gov.au/media-release/the-community-network-ordered-to-pay-penalties-of-230000>

<sup>11</sup> I adopt the Paper’s definition that a ‘phoenix’ company emerges from the collapse of another, with assets shifted from the former company to the new company. The new company conducts the same or similar



I agree with the Paper that for “penalties to effectively deter future breaches of the ACL they must adequately reflect not only the nature and gravity of the breach, but also be sufficient to not be considered ‘an acceptable cost of doing business’.”

On that basis, I simply submit that penalties for “phoenixing” should be substantially increased such that their maxima support and drive the necessary deterrence.

### **3.2.3 Deterrent effect of financial penalties & 3.2.4 Setting and updating maximum financial penalties**

The only submission that I propose to make regarding financial penalties under the ACL is that the maximum amounts allowed should be doubled. As they do now, Courts will retain the ability to levy such penalties as they see fit and according to the particular circumstances of the offending.

### **3.2.5 Role of non-punitive orders**

I support the place under the ACL of Non-punitive Orders and support the discretion of Courts to “only make a non-punitive order if it is appropriate in the circumstances, and the court is satisfied the required action relates to conduct that breached the ACL.”

### **3.3.1 Effective dispute resolution**

My comments regarding alternative dispute resolution (ADR) regarding ‘lemon’ laws at 2.3.4 above are equally apposite regarding this section of the Paper. I therefore make the following submissions:

- 1 I would like to acknowledge the role of Ms Kate Carnell as the inaugural *Australian Small Business and Family Enterprise Ombudsman* (‘ASBFEO’). The ACCC will be aware that Ms Carnell is currently consulting with a range of stakeholders, including the various Small Business Commissioners via the Discussion Paper “*Advocating for small businesses and family enterprises*”.

My view is that the cooperative development of a range of national small business strategies is critically important to the operation of the ASBFEO. I strongly agree with Ms Carnell’s Paper where it properly notes that the power to work cooperatively with other arms of government “*is an especially important power when it comes to issues that the states are responsible for, but which have national ramifications or significance*”. In my view, this sentiment is equally applicable to the ACCC with regard to the *Australian Consumer Law*.

- 2 The other point that I would like to reiterate pertains directly to alternative dispute resolution (ADR) and the successful of ADR work performed within my Office.

A key aim of my Office is to utilise ADR processes to resolve disputes or complaints in a timely manner without the need for litigation. My Office operates in the ADR

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trading activities as the former, and typically involves the same directors and has a similar name to enable it to resume operations while avoiding the liabilities of the collapsed company.

space where the conversation is non-partisan and based upon the broader interests of disputing parties.<sup>12</sup>

- 3 Finally, I note with interest the recent trial by *NSW Fair Trading* of a 'super complaint' mechanism that allows a consumer body to present evidence of systemic issues to the regulator for further research and assessment.<sup>13</sup> I watch this space closely and remain very interested in the outcomes of these trials.

#### 4.1 Selling away from the business premises

Given that for unsolicited consumer agreements provisions the term 'business or trade premises' is not defined, it follows that this will create uncertainty for non-traditional businesses as to whether the provisions apply.<sup>14</sup>

I agree with the Paper that emerging sales practices seem to blur the distinction between 'solicited' and 'unsolicited' agreements, and I note that recently introduced UK regulations do not distinguish between 'solicited' and 'unsolicited' sales.<sup>15</sup> Whilst I do not advocate for or against the adoption of such a system, I do the move away from distinct 'solicited' and 'unsolicited' sales interesting. Instead the UK has made provisions that apply to all purchases, including those made at a distance or face-to-face off-premises (online, over the phone, door-to-door), and including contracts for the supply of digital content.

I can see the 'consumer protection' merit in pushing the onus to provide certain consumer information for sales "made at a distance" or in face-to-face off-premises sales, back onto sellers. It is appropriate that in those unsolicited circumstances, the informational requirements<sup>16</sup> should be more onerous than those for a sale where a consumer approaches a trader's business.

I can also see the 'consumer protection' merit in providing a right to cancel for any reason, within a set period of entry into a contract for services, or from when purchased goods are received.<sup>17</sup>

My submission would be that if such a system were to be mirrored within the ACL, it should be the case that such a right to cancellation should be additional to any right to return faulty goods, goods that do not match their description, or goods that do not do what they are supposed to.

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<sup>12</sup> As compared to any legal rights that the parties might have as would be determined by a Court or Tribunal.

<sup>13</sup> For example, see super complaints project between NSW Fair Trading and CHOICE:

[www.fairtrading.nsw.gov.au/ftw/About\\_us/Our\\_compliance\\_role/Our\\_compliance\\_priorities/Super\\_complaints.page](http://www.fairtrading.nsw.gov.au/ftw/About_us/Our_compliance_role/Our_compliance_priorities/Super_complaints.page)

<sup>14</sup> I note also that this may not be an issue in practice because consumers typically approach a 'pop-up' store, kiosk or vendor van, voluntarily thereby negating "an unsolicited consumer agreement". Adding complexity however, an unsolicited consumer agreement may be created where a seller leaves their stall or kiosk to approach a consumer.

<sup>15</sup> Under the UK Regulations, consistent consumer rights and trader obligations apply to any form of selling made away from the trader's business premises, as set out in the Paper's Box 17.

<sup>16</sup> Which should be in plain-English and not in micro-fine print.

<sup>17</sup> It is appropriate that consumers should be able to waive those rights if they are seeking to download digital content immediately.



### **Closing comments**

I appreciate the opportunity to provide the comments of this Office to the *Australian Consumer Law Review Issues Paper* and look forward to the outcome of the Review. I hope that our submissions are useful to the Reviewers and will be considered in your deliberations.

Should you require any clarification or extra information, please do not hesitate to contact James Rock of this office on (08) 8303 2019 or [James.Rock@sa.gov.au](mailto:James.Rock@sa.gov.au)

Yours sincerely,



John Chapman  
**SMALL BUSINESS COMMISSIONER**

27<sup>th</sup> May 2016